

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 1 1994

In the Matter of)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act)	
Competitive Bidding)	
)	
In the Matter of)	
Amendment of the Commission's)	GEN Docket No. 90-314
Rules to Establish New Personal)	
Communications Services)	RM-7140, RM-7175, RM-7618
To: The Commission		

SUPPLEMENTAL COMMENTS

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OWNED BROADCASTERS, INC.

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SUMMARY

The National Association of Black Owned Broadcasters, Inc., ("NABOB") submits these Supplemental Comments to clarify and expand upon its comments previously filed in these two proceedings. NABOB submits that any PCS licensing and auction plan adopted by the Commission must be based upon the following principals:

1. If designated entities are not accorded preferred treatment in all frequency blocks, then they must be accorded preferential treatment in frequency blocks of the same size and geographic coverage as the largest frequency blocks made available to any other bidder.

2. The historic discrimination to which minorities have been subjected requires that any preference plan accord greater weight to minorities than to any of the other designated entities. Minorities should not be deprived of opportunities which had been previously denied by law and practice, simply because it is now vogue, when dealing with racial minorities to say "forget the past, let's look forward."

3. The Commission must auction all frequency blocks in a geographic area at the same time, especially those for which designated entities are to apply.

4. The Commission should establish procedures to assure that unqualified applicants are not put forward as "front" applicants.

5. The Commission should apply its existing minority tax certificate and distress sale policies to PCS.

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SUPPLEMENTAL COMMENTS

The National Association of Black Owned Broadcasters, Inc., ("NABOB"), by its attorneys, hereby submits its Supplemental Comments in the above-captioned proceedings.

NABOB submits these Supplemental Comments to clarify and expand upon its earlier Comments. See NABOB Comments filed in PP Docket No. 93-253, filed November 10, 1993 ("NABOB Auction Comments"), and NABOB Comments filed in GEN Docket No. 90-314, filed April 22, 1994 ("NABOB Spectrum Allocation Comments"). In NABOB's Spectrum Allocation Comments, NABOB argued that the Commission's proposed frequency set-aside plan was so inadequate and potentially damaging to minority applicants that NABOB opposed the frequency set-asides contained in that plan. NABOB Spectrum Allocation Comments at 3-4. In so arguing, it was not NABOB's intent to oppose all potential set-aside plans. In fact, NABOB submits that the preferred method of allocation should be to

provide a set-aside for minority applicants. However, a principal feature of any set-aside plan must be that any frequency block set-aside for minority applicants must be equal in size and geographic coverage to the largest frequency blocks made available to any other applicant.

Having proposed that the Commission adopt a set-aside plan, NABOB recognizes that fashioning a set-aside plan which can meet all of the Commission's competing interests in this proceeding will be difficult. NABOB submits that the set-aside plan below is the best method of achieving a balance among the many conflicting interests the Commission should consider when establishing an allocation system.

I. NABOB PROPOSED SET-ASIDE PLAN ("BTA PLAN")

1. Allocate three 30 MHz licenses in the lower band, all on a BTA basis.
2. Set aside one 30 MHz allocation for designated entities.
3. Within the designated entity 30 MHz allocation,
 - a. Minority applicants should be accorded a bidding credit equal to 50%.
 - b. Women-owned applicants should receive a bidding credit equal to 1/2 of the bidding credit provided to minority owned companies, i.e., a 25% bidding credit.
 - c. Small businesses and rural telephone companies should receive no bidding credit.

II. ALTERNATIVE ALLOCATION PLANS

NABOB submits that the above-described set-aside plan best meets the Commission's obligation to develop a frequency allocation plan. Should the Commission not agree to adopt the NABOB proposed set-aside plan, NABOB submits the following alternative plans which should be considered. They are set forth here in terms of their rank as potential alternatives.

A. ALTERNATIVE SET-ASIDE PLAN ONE ("ECONOMIC AREA PLAN")

1. Allocate three 30 MHz licenses in the lower band, all on an "economic area" basis. (The proposal to create 183 "economic areas" was proposed by the National Telecommunications and Information Administration ("NTIA") in a letter to Chairman James Quello dated September 14, 1993, p.5. Given the lack of consensus among commenters between the choice of MTAs versus BTAs, the 183 "economic areas" would be an excellent compromise.)

2. Set aside one 30 MHz allocation for designated entities.

3. Within the designated entity 30 MHz allocation,

a. Minority applicants should be accorded a bidding credit equal to 50%.

b. Women-owned applicants should receive a bidding credit equal to 1/2 of the bidding credit provided to minority owned companies, i.e., a 25% bidding credit.

c. Small businesses and rural telephone companies should receive no bidding credit.

B. ALTERNATIVE SET-ASIDE PLAN TWO ("MTA PLAN")

1. Allocate three 30 MHz licenses in the lower band, all on a MTA basis.
2. Set aside one 30 MHz allocation for designated entities.
3. Within the designated entity 30 MHz allocation,
 - a. Minority applicants should be accorded a bidding credit equal to 50%.
 - b. Women-owned applicants should receive a bidding credit equal to 1/2 of the bidding credit provided to minority owned companies, i.e., a 25% bidding credit.
 - c. Small businesses and rural telephone companies should receive no bidding credit.

III. MINORITY-OWNED APPLICANTS MUST BE ACCORDED MORE SUBSTANTIAL BIDDING PREFERENCES THAN WOMEN-OWNED APPLICANTS

One very sensitive, but critical, matter which all of the above-described preference plans recognize is that the Commission must accord minority-owned applicants a greater bidding preference in the auction process than women-owned applicants. NABOB does not raise this issue to get into a "crabs-in-the-barrel" dispute with women-owned applicants. Rather, NABOB raises this subject because it has been well recognized over the course of twenty years of Commission precedent that the factors which mandate the need for minority ownership incentives are not as pronounced among the non-minority female population.

The need for this distinction was recognized by the Commission in its broadcast minority ownership policies for many years. Those

policies include: the distress sale policy, the tax certificate policy, and the policy of providing enhancement credit for minority applicants in comparative hearings for broadcast licenses. The tax certificate policy and the distress sale policy have never been extended to women-owned applicants. Women-owned applicants were accorded enhancement credit in comparative hearings, but the Commission did not accord that enhancement credit the same weight it accorded the minority credit. In fact, as a direct result of this clear distinction, the Commission's policy of providing an enhancement credit for female ownership in comparative broadcast hearings was struck down as unconstitutional by the U.S. Court of Appeals for the D.C. Circuit just two years after the U.S. Supreme Court affirmed the constitutionality of the Commission's policy of according enhancement credit to minority applicants in comparative hearings. Compare Lamprecht v. FCC, 958 F. 2d 382, 70 RR 2d 658 (D.C. Cir. 1992) with Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 67 RR 2d1353 (1990).

In Lamprecht the Court of Appeals discussed the history of the Commission's policy for providing enhancement credit for women owned applicants and contrasted that history with the Commission's policy of providing enhancement credit to minority owned applicants. The Court quoted the decision of the Commission's Review Board in which the Commission's policy of according enhancement credit to women owned applicants was first announced:

We hold that the merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser

significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operations can be of value. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks -- women have not been excluded from the mainstream of society as have black people.

Lamprecht, 70 RR 2d at 659, quoting Mid-Florida Television Corp., 70 FCC 2d 281, 326, 43 RR 2d 811 (Rev. Bd. 1978)(emphasis added).

The Court went on to note that later in the same year the Commission ruled that non-minority women could not participate in the Commission's tax certificate and distress sale policies. Lamprecht, 70 RR 2d 659, citing National Telecommunications & Information Administration, 69 FCC 2d 1591, 1593, n. 8, 44 RR 2d 1051 (1978). The Court quoted the Commission's finding that "we have not concluded that the historical and contemporary [disadvantage] suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's population in a preferential category defined by the presence of 'minority groups'." Id. The Court then proceeded to rule that the Supreme Court's Metro Broadcasting decision upholding the constitutionality of the minority preference policies was distinguishable from the case before the Court in Lamprecht, because neither the Commission nor the Congress had established an adequate basis for the preference policy in favor of women owned companies. Id.

More recently, in the "Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90-314," the Commission's Small Business Advisory Committee ("SBAC") documented the growing disparity between ownership of businesses by women and by minorities. The report showed that between 1982 and 1987 the number of women-owned businesses rose from 2,612,621 to 4,112,787, an increase of 58%, compared to a 26% increase among all small businesses. The report added that, during this same period of time, total receipts of women-owned businesses nearly tripled -- rising from \$98.3 billion in 1982 to \$278.1 billion in 1987, outdistancing by far the 55% increase for small businesses as a whole. The report added that the U.S. Census Bureau showed that 30% of U.S. business were owned by women. SBAC Report at 3-4. The report stated that only 1.9% of these women-owned companies were engaged in the business group containing transportation, communications and public utilities. However 1.9% of 4,112,787 is approximately 78,143 companies. SBAC Report at 3-4. In stark contrast, the SBAC report showed that in, the entire U.S., only 11 minority-owned firms could be found engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services SBAC Report at 4.

Therefore, NABOB submits that the Commission's findings when it adopted the women's preference policy, the findings of the U.S. Court of Appeals when it struck down that policy, and the recent report of the Commission's SBAC, all support the need to provide a

greater preference for minority-owned companies than for women owned companies in the PCS auction proceeding.

IV. PREVENTION OF "FRONT" APPLICATIONS

NABOB is acutely aware of the need to assure that designated entity applicants are not put forward as "fronts" for entities which otherwise would not qualify for designated entity treatment. At the same time, NABOB recognizes that many designated entities will find it desirable and necessary to form strategic alliances with non-designated entity companies. (Indeed, many non-designated entity companies have already announced strategic alliances among themselves.) Bona fide designated entities forming alliances in which the designated entities retain 50.1% control should not be penalized by any policies designed to prevent "fronts" in the bidding process.

To balance these conflicting interests, NABOB submits that the Commission should require that all applicants seeking to bid at PCS auctions be required to file with the Commission, prior to bidding, a detailed description of the substantial prior business ownership and management experience of the ownership and management team which will control the applicant. The Commission should examine the submissions to determine whether the ownership and management team demonstrates a history of substantial business ownership and management which could be reasonably applied to the ownership and management of a PCS system. A showing of "substantial" business ownership and management experience by a minority-owned or women-

owned businesses should include a minimum of three persons within the management and ownership group, each having a minimum of at least 10 years of business management or ownership experience.

While NABOB is mindful of the extra paper work burden such a requirement will place upon applicants seeking to bid for PCS spectrum, this procedure seems to be the only reasonable means of assuring that unscrupulous non-designated entity companies will not pick a minority or woman to "front" as a "rented citizen." Such "front" arrangements do injury to the efforts of NABOB to assure that the Commission's policies designed to encourage minority ownership are used to create meaningful ownership opportunities for minorities. The many legitimate transactions involving minority-owned companies rarely receive media attention, but transactions involving an apparent "front" arrangement frequently receive widespread negative publicity. NABOB offers this proposal as a means of protecting the integrity of the auction process.

V. THE COMMISSION MUST AUCTION ALL FREQUENCIES IN ANY GEOGRAPHIC AREA AT THE SAME TIME

Regardless of the method the Commission adopts for meeting its statutory obligation to disseminate licenses among the designated entities, the Commission must auction all frequencies in a geographic area at the same time. It has been suggested that the Commission might auction some frequencies in a geographic area, but hold off auctioning frequencies for the designated entities until a later date. Any decision by the Commission to adopt such a plan would be devastating to the ability of the designated entities to

obtain an even start with other PCS licensees in the provision of service to the public. Separating the designated entity frequencies for a later auction would allow non-designated entity applicants to obtain a competitive advantage by beginning service during the delay. The Commission should not impose such a disadvantage on groups already struggling to overcome their existing historical disadvantages.

VI. THE COMMISSION SHOULD APPLY THE TAX CERTIFICATE AND DISTRESS SALE POLICIES TO PCS

The Commission should apply its minority tax certificate and distress sale policies to PCS. In particular, the tax certificate policy should be applied to allow any existing cellular, SMR, paging or telephone company, as well as PCS companies, to sell to a minority owned company and obtain a tax certificate. This could prove an effective means of encouraging existing cellular licensees and others to sell their systems to minority owned companies in order to "trade-up" to PCS systems. Similarly, while the distress sale policy has been infrequently used in recent years, application of the policy to the above listed services might result in some opportunities for its reinvigoration in these services. The tax certificate policy also could be useful in aiding minority applicants to raise financing to bid for PCS frequencies by using the provision which allows initial investors holding a less than controlling interest to obtain a tax certificate if they sell out to the controlling minority owner.

VI. CONCLUSION

The Commission is about to make decisions with respect to the auctioning of PCS spectrum which will shape a substantial portion of the wireless segment of the "information superhighway." If the Commission fails to take meaningful steps to assure that minorities are given a realistic opportunity to participate in the ownership of PCS licenses, it will perpetuate the current exclusion of minorities from any participation in common carrier services, thus continuing the current "apartheid" among mass media and common carrier services, and effectively eliminate the possibility of minorities gaining any control over the dissemination of information and viewpoints on the "information superhighway." Such a result would represent a failure of the Commission to meet the clear mandate given to the Commission by Congress in the Budget Reconciliation Act last year to disseminate licenses to minority owned companies, and would amount to an abdication of the Commission's long-standing obligation to provide a diversity of voices in the provision of communications services.

Respectfully submitted,

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